

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VICTOR M. HALL and DEPARTMENT OF JUSTICE,
BUREAU OF PRISONS, Dublin, Calif.

*Docket No. 95-2067; Submitted on the Record;
Issued September 28, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly adjusted appellant's compensation benefits on May 1, 1994 to reflect his wage-earning capacity, based on actual earnings, as a sales associate; and (2) whether the Office properly terminated appellant's compensation effective July 27, 1995 on the grounds that he had no residuals of the August 22, 1985 employment injury.

On January 10, 1986 appellant, then a 48-year-old food supervisor, filed a traumatic injury claim, alleging that he injured his lower back while lifting a food cart on August 22, 1985.¹ On May 12, 1986 the Office accepted appellant's claim for cervical and lumbar strains.² Appellant began participation in a rehabilitation program on February 9, 1987 and held assorted part-time positions between August 1988 and January 1993. On August 3, 1993 appellant was reemployed as a sales associate. The employer indicated that appellant worked 16 to 24 hours per week and received \$6.00 per hour. Appellant did not provide the Office with any W-2 forms or other documentation to establish his exact hours of work or an average of his weekly wages. On May 19, 1994 the Office reduced appellant's compensation based on his reemployment as a sales associate. The Office determined that appellant's wage-earning capacity was \$144.00 per week based on 24 hours of work at \$6.00 per hour. Appellant's compensation was changed from \$657.60 per week, his pay rate as determined for compensation purposes, to \$540.78, the difference between the former compensation rate and his ability to earn wages in his new position. On June 12, 1995 the Office notified appellant that it proposed termination of his compensation on the grounds that he had no residuals of his accepted employment injury. By

¹ Appellant has originally filed an occupational disease claim in relation to this incident which was denied because the injury was based on one incident.

² Appellant had several prior work-related injuries to his back, including an injury to his lower back on October 19, 1978, low back strain on August 16, 1984 and cervical and lumbar strains from karate and judo training on April 16, 1985.

decision dated July 18, 1995, the Office terminated appellant's compensation effective July 23, 1995.

The Board has carefully reviewed the entire case record on appeal and finds that the Office improperly determined appellant's wage-earning capacity based on his actual earnings as a sales associate

Section 8115(a) of the Federal Employees' Compensation Act provides that in determining compensation for partial disability, the wage-earning capacity of an employee is determined by his actual earnings if his actual earnings fairly and reasonably represent his wage-earning capacity.³ Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.⁴

In the present case, the Office did not make a determination that appellant's earnings as a sales associate "fairly and reasonably" represented his wage-earning capacity and that this position was suitable for his medical condition. There is no indication that, consistent with Section 8115 of the Act, the Office considered whether appellant's position as a sales associate represented his wage-earning capacity in light of his age, experience and training. In addition, the Office calculated appellant's earnings based on a 24-hour work week, however, appellant's employer indicated that appellant worked a range of 16 to 24 hours per week. As there is no separate confirmation of appellant's average weekly wage in the form of W2 forms or an itemized earnings statement from the employer, the Office improperly determined that appellant's actual earnings were the maximum possible amount provided by his employer. Therefore, the Office improperly modified appellant's compensation benefits effective May 1, 1994 based on his earnings as a sales associate.

The Board also finds that the Office improperly terminated appellant's compensation effective July 23, 1995.⁵

In the present case, the Office terminated appellant's compensation based on the second opinion medical examination of Dr. James E. Damon, a Board-certified orthopedic surgeon. In a report dated May 12, 1994, Dr. Damon noted that appellant's accepted injuries were consistent with the history of incidents provided but found no objective findings referable to appellant's cervical or lumbar sprains. He indicated that appellant's range of motion was normal and there was no significant tenderness. Dr. Damon concluded that appellant's present injuries were related to incidents that occurred subsequent to his leaving the federal government, involving his

³ 5 U.S.C. § 8115(a); *Clarence D. Ross*, 42 ECAB 556 (1991).

⁴ *Hubert F. Myatt*, 32 ECAB 1994 (1981).

⁵ The Board notes that appellant filed his appeal prior to the issuance of the Office's decision terminating compensation. Although the Board had jurisdiction over the case for determining whether the wage-earning capacity modification was appropriate, the Office could nonetheless determine whether compensation should be terminated based on the medical evidence as this was a separate and distinct matter. As that decision has been issued prior to our adjudication of appellant's appeal and in the interest of judicial efficiency, the Board will address the Office's termination of compensation with the subject matter of appellant's original appeal request.

work in computer design or the natural changes of his degenerative condition and that there was no relation to his accepted employment injuries. He indicated that appellant could perform his date-of-injury position. In a report dated July 20, 1994, Dr. Damon reconfirmed his finding that appellant's current condition was not related to his accepted employment injuries. On the other hand, in reports dated April 29 and June 20, 1994, Dr. John M. Knight, a Board-certified orthopedic surgeon and appellant's treating physician, found that appellant had continued problems and pain related to his accepted employment injuries. He noted that there had been little or no change over the course of appellant's treatment and that appellant had minimal limitation of the cervical and lumbar spines that prevented him from performing his past work and led to his retraining. Dr. Knight found an abnormal range of motion, that appellant had repeated exacerbations of his condition and that after the most recent exacerbation, he had returned to his baseline level of discomfort and daily pain.

Section 8123(a) of the Act⁶ states that if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination. Because there exists unresolved conflicts between the opinions of Drs. Damon and Knight concerning whether appellant is totally disabled, the Office has not met its burden of proof in terminating appellant's compensation effective July 23, 1995.

The decisions of the Office of Workers' Compensation Programs dated July 13, 1995 and May 19, 1994 are hereby reversed.

Dated, Washington, D.C.
September 28, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁶ 5 U.S.C. § 8123(a).